Grace Under Pressure: A Call for Judicial Self-Help

FRANK M. COFFIN*

In sponsoring this series of writings by judges on judging, the editors of this journal have given us a timely opportunity to engage in some badly needed self-help. I say "badly needed" because, it seems to me, the profession of judging is now in its third decade of remorselessly increasing pressures with no let-up in sight.

In both state and federal courts caseloads have increased exponentially in quantity and complexity. These trends have inexorably led not only to vastly heavier demands on each judge but also to increased numbers of judges at every level, a development viewed by some as "cheapening the currency," or lessening the prestige and attractiveness of the office. Exacerbating these stresses are the dramatically increasing gap between the compensation of the rest of the legal profession and that of judges and, frequently, the woefully inadequate support of judges in the form of staff, equipment, and space. Even when the marvels of the electronic age are made available to judges, the very bulk of information obtainable, the plethora of uses suggested, and the rapidity of communication may be seen to threaten the traditional processes of deliberation, discussion, and decision.

It is understandable that many judges feel that the basic values that once attracted and sustained their enthusiasm and sense of self-worth are at risk. Such values include having time to arrive at the right decision for the right reasons, having time to enrich one's intellectual resources (both judicial and extra-judicial), a genuine feeling of collegiality in a multi-judge court, a cherished independence from political and economic pressures, the realized respect of citizens in general, and a frequent sense of the "fun" of judging, the feeling that comes when we have done our work at a high level of excellence.

This series of writings by judges could not be put to better use than in enlisting judges to help other judges—and lawyers, too—to cope with this bundle of end-of-century pressures. Such a focus would not add to the already rich store of traditional judicial writings on the nature of law, the proper interpretation of the Constitution and statutes, the varied modes of useful legal reasoning, or what constitutes successful advocacy at the trial or appellate levels. Nor would this specific emphasis on judicial self-help in coping with pressures include such other vital issues as changes in the original jurisdiction of trial courts, the allocation of types of cases between state and federal courts, restrictions on mandatory appellate jurisdiction, the creation of specialized courts including a new national appellate court. Judges, of course, should be heard on such issues, but their voices are not determinative. Such broadly representative groups as the recently authorized Federal Courts Study Committee will address this range of mega-issues. Finally, there is no need for the self-help focus to deal with the material conditions of a judge's work and life such as

* Judge Coffin is a member of the United States Court of Appeals for the First Circuit and Chairman of the Committee on the Judicial Branch of the United States Judicial Conference.

compensation, fringe benefits, and support services—matters beyond judicial control.

A threshold question is whether self-help is possible. Do judges have anything that can be given to others? Are such qualities as initiative, a gift for innovation and ingenious improvisation, flair, and intuition communicable?

I recently spent some time with a widely respected judge who had also taught in law school for more than three decades. He was telling me about his teaching a course in negotiating. I asked, "Can this be taught?" His answer was the question, "Can it be learned? If it can be learned it can be taught." Then he quickly added, "Of course not everything can be taught. The basic skills and attitudes and sensitivities can be passed on. There is always something more to it. But this is better than trying to do all of it on the job. Anything that is learned wholly on the job can be improved."

Here we come to the essence of learning how to live and work with grace under pressure: seeing what the masters do. We know that even today as in centuries past art students troop to the Louvre, the Prado, the Tate to study the works of the masters. They observe and copy the masterworks minutely—not merely to make a copy but to appreciate how the great artists conveyed light and shade and shadow; nearness and distance; flesh and water and sky; doubt, despair, joy, and faith. Similarly, this is how medical students have pursued excellence in their vocation for centuries. Only when they left their treatises for the operating room theater did medical education reach a high plateau of excellence.

This is what we judges should be doing—learning from our peers what they do and why they do it when their performance of a judicial function rises to such a level of elegance and excellence that it can truly be called a work of art. This observation of grand masters at work should focus on all the many facets of the judicial art. But we have a problem, illustrated by one exchange of conversation I witnessed between two other judges. One was the teacher-judge I mentioned who taught negotiating. The other was a highly reputed veteran trial judge in a metropolitan center. The latter began talking about his negotiating activity—rather, about bringing to pass settlement negotiations in pretrial conferences. He would hold as many as twenty of these a day at fifteen-minute intervals. He was so successful at this that his colleagues would refer their cases to him. When we asked him what he did, he replied that he handled no two cases in the same way. But he would, after a few well-chosen inquiries, soon find what he called "the soft underbelly" of the case, the area that could provide the basis for a fair settlement. The teacher-judge then asked him what his basic technique or strategy or, if you will, his art was. He confessed that he was utterly unable to give us any intelligent account. Whereupon the teacher-judge came up with the brilliant suggestion that the other judge ask his law clerks, after they had been on the job six months, to undertake not only to observe him conducting these pretrials but to make detailed notes of the course of inquiry and response—to replicate the operating room and the close examination of a masterwork of art.

This is what we need on all fronts: accounts by or about gifted judges of what they do in their various roles. At present we lack a literature of judicial reporting based on reflective self-examination and close observation by others. To me the

prospect of breathing life and reality into the concept of the art of judging depends for its realization on accumulating such studies of the masters all around us. The increasing presence of television and the availability of videotape records make possible an abundance of recorded masterworks. What remains to be done is to develop the arts of introspection and self-analysis on the part of the doer and close observation by the learner.

Accepting the premise, therefore, that some judicial gifts and experience are communicable, I venture the following tentative catalogue of judicial self-help contributions to "the art of coping" or "the art of living and working under pressure."

Trials. Some judges have huge backlogs and labor with futility, like Sisyphus, to reduce them. Others seem to manage well, even under today's pressures. What are their secrets—in controlling discovery, in moving cases on schedule, in holding productive pretrial conferences, in settling cases, in selecting juries expeditiously, in firmly governing complex litigation, in issuing prompt decisions buttressed with sufficient, but not excessive, findings of fact and conclusions of law?

Appeals. Much discussion of ways in which appellate courts can best concentrate their energies is centered on the possibility of giving different investments of time and care to appeals that raise important issues of law and to appeals that raise only questions of simple error in factfinding or in application of established legal principles. If ways could be found to identify, with economy, which cases present merely issues of error correction and which involve "lawmaking" questions, appellate courts could easily assign the former to a summary form of disposition and reserve the latter for extended analysis and discussion. I sense a crying need for insights, techniques, experiments, and sharing in attempting to screen cases for "error correction" and "lawmaking." If this proves to be a useless exercise, the sooner we know it, the better.

Collegiality. The increased size of courts and heavy workloads militate against the old-fashioned collegiality that existed when judges sat often with each other, had leisurely discussions together, wrote thoughtful memos back and forth, and, over a year's time, had many opportunities off the bench to dine and socialize with their colleagues. Friendship bred respect which led to consensus or, at least, civility. Now, with both trial and appellate courts composed of even larger numbers of judges, collegiality is at risk of being an endangered condition. So, there is need for a new collegiality, fitting the conditions of these times. We need wisdom in ways of stimulating friendly, intimate, respectful feelings in people who do not work with each other very often, and whose values may differ quite fundamentally.

Working with Law Clerks. Not so long ago the pressures on judges were not so great but that a judge could, if so minded, expect from a law clerk only some technical cite checking and minor research on discrete legal questions. Today I suspect most judges, trial and appellate, must place much greater reliance on clerks to do much more significant work. How to use clerks to the optimum, how to avoid underuse of as well as overreliance on them—this is clearly an area where contemporary judges have much to teach each other.

Management/Governance. Judges are presently beset by pressures to subject other judges to sanctions for substandard conduct, to seek more professional management by judicial technocrats, and to resort increasingly to committees (in trial courts, appellate courts, judicial councils, and state and U.S. judicial conferences) to address both management and governance. The ascendance of the management-governance function, whether by collegial group, technocrat, or committee, poses, if untouched, an insidious threat to the judicial functioning of the judiciary. What is needed, therefore, are practicable ways of setting national standards, reposing responsibility on regional and local entities, and keeping to a minimum the involvement of judges—who, after all, opted for the job in order to judge, not to administer or be a member of a committee. Here, accounts of courts and councils which have solved problems of management and governance with a minimum of bureaucratic apparatus would be refreshing.

Technology. For judges it is either feast or famine. To take the latter first, it is not merely unfair but short-sighted to deny to courts up-to-date computers and software which could enable them to control dockets, impanel juries, and collect needed statistics. The former poses a more subtle hazard—to foist on judges such a panoply of mechanisms, systems, and devices that they threaten to supplant deliberateness in decisionmaking. The profusion of the case law resurrected by computer-assisted research threatens to overpower selectivity and prioritizing in the use of precedents. And the immediacy of electronic transmission of documents has its frightening aspect: how or why should one respond within minutes to what another may have spent days and weeks in producing?

Of course, the availability of a complete videotape of a trial is seductive. The promptness and the detailed accuracy of the proceedings below hold out great promise of increased expedition and fairness in processing future appeals. The temptation, however, will be to give the lower court's proceedings a review that involves little if any deference. In short, the scintillating achievements of technology may work against the historic division of labor between the trial and appellate courts. Here, as in the other areas of technology cited, there is a need for human judgment in determining when technology serves the judicial process and when it begins to dominate.

Consistency/Predictability. There is a perception that courts, even those within a single state or federal circuit, may come to disparate conclusions on similar or identical issues. To the extent that this perception is widely shared, appeals will be stimulated. How to convey the appearance—and the reality—of predictability and consistency is a key question.

This seems to me a problem capable of solution—or minimization—by judges themselves. To begin, inconsistency within a state or federal circuit is more of a problem than inconsistency between different states or circuits. The circulation of resumes of cases involving similar issues while opinions are pending should help the right hand to know what the left hand is doing. The circulation to the entire circuit court of a panel opinion which would create a conflict between circuits would seem a useful preventative medicine. Whether or not the circulation of all draft opinions of

a panel to the full court before issuance occasions more benefit in consistency or more burden in reviewing and commenting is a proper subject for judicial reportage based on experience. So also would be the settling effect of "en banc" opinions in which only a significant fraction of the entire court participated. Finally, it would be a major contribution to thinking about the need for a new national appellate court (or other devices to achieve uniformity) to monitor the quantity and seriousness of conflicts in the decisions of the various circuit courts of appeals. Are we dealing with a mountain or a molehill?

Private Time. Judges have a great deal to give each other in describing how they use their extra-judicial time. Their advice can range from exercise routines for lessening stress and burnout to how they gain more depth and breadth in judicial/legal literature and, beyond this, to what sources they resort in search of a wider and richer experience in the arts and humanities. This would include comments on the pluses and minuses of teaching and the need for and use of sabbatical leaves. In their search for serenity, judges ought to be their own best analysts.

The Lawmakers. Although judges have no writ (except for constitutional issues) that runs against lawmakers, they must not abandon efforts to communicate on common problems. There are some areas where effective communication can measurably simplify their work, without triggering any significant controversy. Three such areas come to mind: reporting to the appropriate legislative decisionmakers observed maladroitness, inconsistencies, and gaps in enacted statutes, so that "statutory housekeeping" can be performed; working toward a common set of "legislative history" signals to cover all feasible issues of legislative intent and to indicate which are primary and which are not; and continuing the quest for an opportunity for judicial input on the prospective impact on judicial resources of proposed legislation.

All I have written is in the hope that it may stimulate the thinking of the editors and the judges they seek to involve in this series. I see the possibility of making a significant contribution to a very practical, "how to" genre of writing on judging. Perhaps it may be thought that this is a modest goal for a learned journal. My own conviction is that the goal is a noble one—to address and improve the health and well being of the nation's judiciary, to the end that it may survive with grace under pressure.